K.

1946. **File No.** O.B.C.S-Rs 46.

K

Legal DEPARTMENT

A BRANCH

Subject:—

P-53/E

Opinions under the Bombay Civil Services Rules.

File No. O.B.C.S.Rs/46.

Std. Sectt. Slip 24 B e.

56-A

C O N T E N T S.

Legal Department, Vol. No.O.B.C.S.Rs./1946

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6.	O.No.447-P.Confl/2.9.46	Question whether the strikers under arrest pending the court proceedings against them for the xxxx erson, illegal obstruction and assault can be allowed to resume work. Rule 156 of the B.C.S. Rules.	

3.5

7. O.No.441P-Confl. 28.8.46. Re: Employment of Col. Bates by Govt. on a contract basis for a period of three years the appointment being terminable at six months' notice on either side. Enjoyment in advance 4 months leave on a.p.by ---

Questions (1) whether Govt. can claim refund of the pay for the unearned leave enjoyed in advance by Col. Bates; (2) whether Govt. is bound to provide a free passage to him.

37

8. O.No.488-P/10.9.46 Re: Temporary appointment of a person by Govt. for a period of one year on contract basis subject to the condition that the contract can be terminate by one month's notice on either sides. Termination of contract by efflux of time but still continuance in service of the person concerned.
Question (1) whether on th termination of the contract period he can be deemed to be employed on monthly basis; and
(2) if so, whether his servic can be dispensed with ~~xx~~ giving a month's pay in lieu of notice.

9. O.No.249-Confl 23.9.46 Re: Termination of services or stoppage of increment of a Govt. servant who is appointe on probation for two years, f for not passing the departmental and language examination within the period of probation. 39-41

10. O.No.5861/24.8.46 Question regarding giving opinion for the guidance of Local Officers of the P.W.D. in regard to appointments of men borne on the regular temporary and work charged establishments in the P.W.D. as defined in the P.W. Manual Vol.I paras 88-92 43-45

11. R.I.No.7735/6.9.46 O.No.7089/18.10.46 Question regarding payment of arrears of pay and allowances from the date of suspension till the date of retrenchment of a Govt. servant whose services wer terminated as a result of retrenchment. 47-51

12. O.No.266-Confl/29.10.46 Question whether in cases where there is no provision for terminating employment by notice in a temporary appointment notice of one month would be legally unobjectionable or not. 53

22/5 22/5 14/1/56.

1044 dated 28-11-1945

Submitted with reference to the note of the Addl. D.C.S.(Inf.) dated 26.11.1945 (pages 51-52).

2. On Mr. M.V. Shah was working as a Deputy Chief Inspector in the office of the Dy. Director of Agri (S.P.). He had executed an agreement dated 30.1.1945 at p-3, under which he had agreed that if he wished to resign his employment, he shall give notice in writing for a period of not less than thirty days of his intention to resign or in default to forfeit to the Governor such sum not exceeding his pay for one month, as the appointing authority may fix. He tendered the resignation of his post on 5.7.1945 (pages 5-6- ante) with a request to accept it immediately. His resignation could not be accepted immediately as he failed to give a month's notice as required under the agreement executed by him on 30-1-1945, and also for the reasons stated in the office note of the Dy. Director of Agriculture (D.F.) at p.39 ante. He was informed accordingly (p.6 ante). He then requested that he may at least be granted 10 days earned leave as he had to attend to some family matters urgently, Before the question whether the leave asked for should be sanctioned or not, Mr. Shah remained absent from 6.7.1945. On 10.7.1945 the leave was refused and it was decided that his explanation should be called for, as he absented himself without permission when he resumes (p.8 ante). It seems that these orders were not communicated to Mr. Shah On 16.7.1945, he applied (p.9) for a further extension of leave for 15 days. In the same application he also inquired whether his resignation was accepted. As he proceeded on leave without permission, on 26-7.1945, his services were terminated with effect from 1-7-1945, and the pay for five days he worked in July was forfeited. Mr. Shah

has threatened Govt. with a civil suit by giving notice under section 80 of the C.P.C.(p.18 ante), claiming inter alia his salar for five days in July which was forfeited. On the above facts, the point for determination is whether the pay of Deputy Chief Inspector Mr Shah for the first five days he worked in Jyly for the reason stated by the Permit officer in his letter at p. 15 ante namely that he remained absent without permission, can be forfeited The R.L.A. is also requested to state whether the agreement at p 3 was approved by the R.L.A.

3 The agreement executed by Mr. M.V.Shah on 30.1.1945 under which it is proposed to forfeit his pay for the first five days he worked in July, is not legally in order The agreement is unilateral and is not made with the Governor of Bombay, as required by section 175(3) of the Govt. of India Act, 1935, nor executed on behalf of the Governor of Bombay as stated therein. As the agreement is not executed in accordance with the provisions of section 175(3) of the Govt. of India Act, 1935, there does not exist a valid contract enforceable at law against Mr. M.V. Shah (cf.last para. of R.L.A's) . In view of this legal flaw, it would not be legally feasible to forfeit the pay of the Deputy Chief Inspector Mr. Shah for the first five days he worked in July. for failure to give one month's notice as required by the said agreement. On merits also, as his resignation tendered on 5-7 (pages 5-6 ante) was not accepted, he applied for earned leave for 10 days (p.6) and himself remained absent from work without permission as from the very next day(p.7 ante). Not hearing from the department, he applied for extension of leave on 16-7-1945 (p.9.) but even then he was not infomed that his aplication for earned leave for ten days was rejected. Strictly speaking, he should have been considered on duty on the

Mr/20/4

Office of the R.L.A.

Ordinarily a month's notice on either side is necessary to terminate the services of a temporary Government servant. Although the agreement executed by Mr. Shah in the present case is unilateral, there will be no legal objection to relying on it to fix him with the knowledge that he was required to give a month's notice before leaving service and the failure to give such notice would involve forfeiture of a month's pay. Since Mr. Shah did not give such notice and remained absent from 5-7-1945 on which date he submitted his resignation there would have been no legal objection to forfeiting his pay for the first four days of July. But unfortunately the Permit Officer in his memorandum(at p. 15 ante) forfeited Mr. Shah's pay for the first four days of July not for his default in giving a month's notice but for remaining absent without permission, which is hardly a valid ground. The claim also is small. In the circumstances it could be advisable to effect an amicable settlement.'

S/-
11/1/46

Remembrancer of Legal Affairs.

U.H. to Addl D.C.S.(Inf.), No 206 dated the 16th Jan. 1946

Mr/20/4

L.D.&R.I. No. 488/17-1-46

Submitted with reference to the P.W.D. note at p. 19 ante.

2. The facts of the case are as follows: One Mr.V.M.Gamnato, E.E. was working as an overseer in the work-charged establishment under the Executive Engineer Road Projects Division (North) Bombay from 10th December 1944 to 31st January 1945, on a salary of Rs. 150/-p.m. He was not engaged for any specified time. On the 20th January 1945 he submitted his resignation with effect from the same date after notice hours and remained absent from duty without even waiting for his resignation being accepted inspite of the fact that he was informed by the Sub-Divisional Officer that he would not be relieved until his resignation was accepted. The Executive Engineer informed Mr. Gamnato on the 25th January 1945 that one month's notice of his intention to leave service was required and that as he left service abruptly in contravention of the clear orders of the Sub-Divisional Officer his services were dispensed with and his salary for the broken period of January (from 1st January to 20th January 1945) was forfeited to Government. Now Mr. Gamnato, through his Advocate, requests Government to arrange for the payment due to him i.e. his pay from 1st January to 20th January 1945. The G.P.W.C. Bombay who was consulted by the Executive Engineer, in the matter has opined that Mr. Gamnato is not entitled to any salary for the broken portion of the month. In addition, Government is entitled, according to him, to claim damages for the breach of contract of service. But as the question of principle as to whether notice of one month is required in case of person appointed

appointed on the work charged establishment on monthly basis, is involved in the case. these papers have been referred to the R.L.A. for this advice

3. The P.W.D. has it seems, tried to make distinction between the persons, appointed on work-charged establishemnt and the persons appointed on temporary establishment but it is doubtful whether such a distinction can be made. The B.C.S. Rs. do not recognise any such cadss of servants appointed on work-charge establishment but the servants employed on temporary basis have been so recognized in the B.C.S.Rs. (Vide Rule 56 of the B.C.S. Rs.) As Mr. Gumaste had been appointed on a ~~xix~~ salary of Rs.150/- per month, it is clear that he was not appointed on daily wages. Neither had the payment of his salary anything to do with completion of certain works. Consequently the difference between the two establishments seems to have been made only for the sake of debiting the amounts to those particular heads and it appears that it does not affect rhe legal position in any way. Moreover whatever the name might be given to his service yet the relations of Mr. Gumaste with the Government were those of a servant and master and therefore the usual provisions of law would be applicable to them in the absence of any specific rules or contract to contrary There is no specific rule regarding a period of notice of discharge on the work charges establishement. Neither was any agreement executed by Mr. Gumaste in the present case. The ordinary rules in the matter would therefore govern the present case.

4. The G.P.H.C. Bombay has, in his letter at p. 11 ante quoted the relevant authorities on the point at issue. They can be summed up as follows: where a servant is guilty of a breach —

—of the contract ofservice the master is entitled to recove
damages . There is a breach of the contract whenever the servant th
leaves his service without just cause or exists before the
expiration of the agreed term or when no term has been
fixed for the duration of the contract, without giving
due notice. In the absence of any express provision in
the contract to the effect that the master may retain
any wages due to the servant at the time of the breach
as liquidated damages, the master remains liable,
notwithstanding the servant's breach of contract, to pay
him any wages already accrued due and remaining unpaid
at the date of the breach, since the servant's right
to payment is not affected by the subsequent breach. Where
however, no wages have accrued due at the time of the
breach or of the dismissal, as the case may be, the
servant is not entitled to claim remuneration in respect
of the services already rendered, unless there is an
agreement to that effect (Halsbury's Vol 22 pp 161-162).
Consequently a servant engaged on a monthly salary is not
entitled to any salary for the broken portion of a month in
the course of which he leaves his service without the
consent of his employer (I.L.R. 35 Allahabad 132). The
I.L.R., in his opinion 206 dated the 12th January 1946,
has held that ordinarily a month's notice on either side
is necessary to terminate the services of a temporary
Government servant. Since Mr. Gunneta did not give such
notice and remained absent from the 21st January 19
before his resignation was accepted, there would be no
legal objection to forfeiting his pay for the twenty
days of January 1945. The Executive Engineer's letter
informing Mr. Gunneta that his pay for the twenty da s

of January would be forfeited, is at p. 23 ante It cannot be said from reading the letter as a whole that Mr. Gumaste's pay was forfeited because he remained absent before his resignation was accepted and inspite of the fact that he was informed that he could not be relieved until his resignation was accepted. The letter clearly states that one calender month's notice to leave service was necessary Consequently the forfeiture of pay can be taken to be in lieu of the failure of giving the required notice.

6/2/46
A.S.(A)

The notice may be in accordance with (i) the express agreement or (ii) the implied agreement between the parties, or (iii) custom or (iv) of reasonable duration. What is reasonable notice is a question of fact which depends upon various factors. Its primary object is to enable the servant to obtain similar employment and earn his previous salary, and the master a similar servant. It must, therefore, be reasonable from the point of view of both the master and servant. The master is entitled to reasonable notice of termination of the services by the servant and reasonable damages if such notice were not given (Amar Singh V. Gopal Singh, (1930)132I.C.577). Where as servant who was engaged by the month, served from 1st November to 3rd December 1872, and left his master's service on the 4th December without giving any notice, Westropp C.J. and Melvill J held that the servant was entitled to be paid his wages up to the end of November but forfeited the wages payable to him in respect of his December services (Ramji Manor v. F.D. Lettle, 10 Bom. H.C.R.57). A monthly servant who leaves without notice

is entitled to be paid down to the date, when the cases were last due but not for the broken period he has served. An office clerk engaged on a monthly salary is not entitled to any salary for the broken period of a month in the course of which he leaves his service without the consent of the employer (cf) 39 All 132).

Attention is also invited to my note dated 27-12-1945 underlying R.L.A's No 236, dated 12-1-1946 wherein a similar point was considered. The G.P.H.C. who was consulted in the matter is also of the opinion that Mr. Gurnsto is not entitled to the salary for the broken protion of the month

If approved, reply may be ---

"the view expressed by the Government Pleader, High Court Bombay, in his letter No 4003, dated 22nd November 1945 at pages 11-12 ante is correct".

16/2/2

A.L.R

I agree to the reply proposed by A.S.'s

Sd/-
9/2

R.L.R.

Sd/-
16/2/46

U.R. to P. [illegible] No. 1427 dated 20-2-1946

Hr/20/4

No.S.21/B of 1946

Office of the Surgeon-General
With the Govt of Bombay

Bombay, 12th March 1946

From,

THE SURGEON-GENERAL
WITH THE GOVERNMENT OF BOMBAY,
BOMBAY NO. 4M

To,

The Remembrancer of Legal Affairs.

Bombay.

Subject:- Clerks
Resignation of -

Sir

I have the honour to state that one Mr. V.D. Pathak was appointed as a temporary clerk in this office from 30-7-1945 He was appointed on the conditions that his services were of temporary nature and subject to termination without notice if the exigencies of the services so required but in case he wanted to leave the service he would be required to give one month's notice. Intimation to this effect was also given by Mr. Phatak at the time of his appointment.

2. Mr. Phatak remained absent from duty without permission from 20th to 28th December 1945. He attended the office on 29th and 31st December 1945 the latter being the last day of his attendance in this office. On 3-1-1946, Mr. Phatak was asked by this office to state the reasons for his absence from duty without any intimation or previous permission or to produce a medical certificate if the absence was on medical grounds (vide copy) of this office Memo. No. S.56/Accts., dated 3-1-1946 enclosed). He was also informed that if no reply was received from him within a period of four days from the date of the above Memo. his services would be liable to be terminated. Communication in reply has been received from Mr. Phatak. It is therefore proposed to dispense with his services from 31-12-1945 (afternoon) and to withhold his pay from 1-1-1945 to 31-12-1945, permit both days inclusive as he has remained absent without permission and not given the requisite one month's notice.

3. As Mr. Phatak has earned his pay for the whole month of December 1945, it seems however, doubtful whether, in the circumstances explained above, his pay for December 1945 can be withheld. I invite a reference in this connection to your letter No 6124, dated 1-9-1944, and request that you will be so good as to advise this office about the legal position in the matter.

Yours obedient servant,

Sd/-

For Surgn Genl with the Govt of Bombay

Lr/20/4/

No. S.56/ ..tt.'s of 1946

OFFICE OF THE SURGEON-GENERAL
WITH THE GOVT. OF BOMBAY

Bombay 3rd Jan. 1945

MEMORANDUM.

Subject: Leave to clerks.

It is noticed that you were absent from duty from 20th to 28th Dec./ 1945 and again since 2nd January 1946 without any intimation or previous permission as required. Please state the reason for this absence from duty and by no intimation was sent about it so far. If, however, the absence is on grounds of ill-health the necessary medical certificate from a registered medical practitioner in support of the same should be furnished forthwith, stating the number of days' leave you would still require.

2. If no reply is received within a period of four days from the date of this memo. your service will be liable to be terminated

Sd/- P.L. Durli,

Surgeon-General with the Govt. Bombay

To,

Mr. V.G. Pathak, Clerk,
C/O K.[illegible], Photak, Shanti Sadan, Room No 23,
Dr.Khareghat Marg, Thakurdwar, Bombay No. 2.

Mr/20/

No. 8,21/B of 1946
OFFICE OF THE SURGEON-GENERAL
WITH THE GOVT. OF BOMBAY

Bombay 6th May, 1946

From

THE SURGEON-GENERAL
WITH THE GOVERNMENT OF BOMBAY,
BOMBAY NO. 1

To,

The Remembrancer of Legal Affairs,
Bombay

Subject:- Clerks
Registration of.

Reference your letter No. 2884, dated 16-4-1946

A copy of the undertaking given by Dr. V.S.Patak at the time of his appointment is enclosed. In reference except this office Memo. No.8,36/Accts, dated 3-1-1946, copy of which has already been sent to you with this office letter of even number, dated 12-3-1946, has been made by Dr. Patak

Sd/-

For Surgeon-General with the Govt of Bombay

Dr/20/4

Bombay
Dated 30th July 1945

To,
The Personal-Assistant
to the Surgeon General
with the Government of Bombay,
Bombay.

Sir,

I beg to state that I will not leave this Service unless I give one month's notice to this office.

Yours obediently,

Sd/-
V.B.Patel,

Dated 30th July 1945.

Mr/820/4

U 79

Letter.

No. 3343

Office of the
Remembrancer of Legal Affairs,
Bombay Castle, 22nd May 1946

To

The Surgeon General,
With the Government of Bombay,
Bombay No. 1.

Subject:- Clerk
Resignation of -

With reference to your letter No. S 21/ D dated the 2th March 1946 and the subsequent correspondence on the subject noted above, I am to observe as follows:-

"Sometimes the contract of service expressly provides that the master may retain wages due to the servant at the time of breach as liquidated damages. In the absence of any such provision the master remains liable notwithstanding the breach of the contract to pay him any wages already accrued due and remaining unpaid at the date of the breach since the servant's right to payment is not affected by the subsequent breach" (see Halsbury Vol 22 pages 162). In the present case no doubt Mr. Pohtek committed a breach of the agreement by failing to give a month's notice. But by the time he committed the breach his pay for the month of December, 1945 had accrued due. There being no provision in the agreement for the payment of liquidated damages for the breach, Government would not, strictly speaking, be entitled to withhold Mr. Patak's pay for the month of December, although Government can claim damages separately for the breach. The claim being small, it would be advisable to settle it amicably.

Sd/-
22/5/46

Remembrancer of Legal Affairs.

b/20/4

submitted with reference to office noted the G.O.C.S.(b) dated 14-6-1946 at p. 11 ante.

2. It appears that one Mrs. Talmiun H Bengali was a cashier at the G.S.C.Hq. 7 Under office order No.S.S.C.7/11832, dated 16-3-1945. on the last page of the file below, the services of Mrs. T.H. Banji were terminated with effect from 15-2-1945 In her representation dated 17th May 1946 pp. 1-3 ante, she has claimed (1) salary from the 15-2-1945 to the 3rd March 1946 (2) the sum of Rs.10/- deducted as subscription from her deposit, and (3) Rs. 1-10-0, before the Tribunal on 7th May 1946 Her representation has been examined in the office of the G.C.S.C. at pages 5-6 ante and it has been found that she has no case and it is proposed to inform her as per draft reply prepared by the Legal Adviser to the C.A.O. at pages 9-10 ante. This reply is shown to the A.L.A. to favour of opinion pp.10 ante.)

3. The point or points on which the A.L.A's advice is sought on the proposed draft letter at pages 9-10 ante, has not be specifically stated. However it appears that it is generally in order and for all purposes. It will suffice, if she is informed as proposed in the last paragraph of draft reply at pagels 9-10 ante. The following remarks are made for information.

(1) office order No G.S.C.7/11832 dated the 16-3-1945 on the last page of the file below, read with slips marked B and A in thatfile, evidently shows that the services of Mrs. T.H. Banji

..r, Government Grain Shop No. 7 were terminated with effect from 15-2-1945. A copy of the said order seems to have been addressed to her. It is therefore not understood on what ground she can claim salary from 15th February 1945 to 3-3-1946 (I' office notes underlaying R.L.R's No 1777 dated 26-6-1945)

(2) As regards the sum of Rs.40 deducted as ~~xxxx~~ shorgate from her deposit as alleged by the petitioner, it has been stated that a sum of Rs.31-11-0 was rightly deducted from her security amount. As the papers regarding shortages are in the C.A.O's office (p.6) it is presumed that the sum of Rs.31-11-0 has been correctly mentioned as against the sum of Rs.40, alleged by the petitioner.

(3) As regards the texi-hire of Rs.1-10-0 on 7-5-1946, it is not understood how she can claim taxi-hire on 7th May 1946. when she was not in service on that day. Therefore, after verifying the above fact, for the words "authorisied to incur such expense for any Govt. work or duty, and the same cannot be allowed" in the last paragraph of the proposed draft letter at p.10 the words " in Government service on that day" should be substituted.

Id/2/7/46

No specific point is ~~required~~ raised for R.A's consideration. The ~~important~~ draft reply appears to be in order. The papers may be" seen and returned. "

Sd/-

9/7

P.A.

Reply may be:-

In reply Govt should merely state that Mrs. Ramaji's claim for (a)Salary for the period from 15-2-1945 to 3-3-1946, (b) Rs.31-11-0 deducted from her security amount and (c) Rs.1-10-0 for t/ taxi-hire is untenable and that all her other allegations are unfounded and false.

Sd/-
10/7

R.L.A.

Sd/-
16/7/46

U.R. to the controller of Govt. Grain-shops
No. 5107 dated 16-7-1946

Ir/20/4

Office of the R.L.A

In reply Government should merely state that Mrs. Dannji's claim for (a) salary for the peri d from the 15th February 1945 to 3rd March 1946, (b) Rs. 31-11-0 deducted from her security amount and (c) Rs. 1-10-0 for taxi-hire is untenable and that all her other allegations are unfounded and false.

d/-
17/7/46

U.R. to the Controller of Govt Grain Shops
No. 5107, dated the 19th July 1946

Lr/20/4

Submitted.

2. It appears that Mr. Sutaria, a cashier in the Government Grain Shop No 161, who was dismissed from service with effect from 7th September 1945 has left a cash security of Rs.400/- and his wife has made a request that the security may be refunded to her as her husband is mentally unsound and is likely to squander away the money if given to him. She has produced two medical certificates to this effect. Her application has been duly countersigned by the P.C. Magistrate, Navsari of the Baroda State. P.G. consider that as Mr. Sutaria is alleged to be of unsound mind his case would be governed by the provisions of the Indian Lunacy Act, 1912 according to which a manager is appointed to manage the estate of a lunatic. The question raised by P. and Controller of Govt. Grain Shops is whether the refund of a cash security to the wife of Mr. Sutaria who is certified by the State Medical Officer to be of unsound mind would constitute legal discharge on the part of Government

3. No provisions appear to have been made in the Financial Rules under Devolution Rule 37(c) made by the Government for the refund of a cash security in such case. In the circumstances the provisions of the general law will apply. In his opinion No 7185, dated the 9th August 1940 where a providentfund amount was claimed by the wife of a lunatic, the A.G. observed thus:

'In this case no manager has been appointed for the estate of the subscriber who is a lunatic.

The wife of the lunatic is in Janjira State
If she is able to produce a certificate from a
competent court in the Janjira State that she is
entitled to recover the amount of the provident
fund on behalf of the lunatic and is competent to
pass a valid discharge for such payment and if such
certificate is countersigned by the Political Agent,
there will be no objection to make a payement to her".

In the present case Mrs. Lilawati R. Sutaria wife
of Mr. R.K. Sutaria has merely produced two medical certificates
from registered medical practitioners in the Baroda
State that her husband has become
insane and her application has been countersigned by
the F C. Magistrate of Navsari. A man medical certificate is
not sufficient to untitle the wife to claim from Govt the
cash security. If she is able to produce
a certificate from a competent court in the Baroda State
as stated in the above opinion she would be entitled to
recover the amount of the cash security on behalf of
the lunatic and would be competent to pass a valid
discharge for such payment. (cf also R.L.A's No 141,
dated 8th January 1941).

Id/ 29/9

I am not inclined to the above view which is based
on the statutory provisions of rule 31(2) of the G.P. Fund Rules,
1936.

The present question however pertains to repay ment of
of the cash security of Rs,400/- deposited with Govt. by Mr.
R.K. Sutaria has now gone insane. The question is whether if the
security amount is paid to Mrs. Sutaria. the receipt passed by her
will afford a valid discharge to Govt against any subsequent claim from

for the amount by Mr. Sutaria or any other person

The Baroda State should have an enactment similar to the Indian Lunacy Act, 1912. If it contains provisions parallel to sec 56(1) of the Indian Lunacy Act, 1912, Mrs. Sutaria may move the Court to appoint her to realise the amount of Rs.400/- from the Govt for maintenance of the family and on being a.

Office of t..

A mere medical certificate that Mr. R.K. Sutaria is of an unsound mind would not be sufficient to entitle his wife to claim from Government his cash security, much less to give Government a valid discharg for such payment.

Sd/- 2/8/46

Remembrancer of Legal Affairs.

D.O. to the Controller of Government Grain Shops No. 808 dated the 22nd August 1946

Mr/20/4

Office of the H.L.I

It appears that twenty-four strikers are under arrest and court proceedings are pending against them for the offences of arson, illegal obstruction and assault. H.M.' (Labour)has directed that, 'to avoid complications setting in at this stage the twenty-four strikers may be allowed to resume work.' H.D. considers that in view of rule 156 of the Bombay Civil Services Rules it will not be in order to allow these strikers to resume work.

Rule 156 of the Bombay Civil Services Rules provides:

"A Government servant committed to prison either for a debt or on a criminal charge should be considered as under suspension from the date of his arrest and therefore entitled only to the payments specified in rule 152 until the termination of the proceedings against him, when, if he is not removed or dismissed from service on adjustment of his pay and allowances should be made according to the conditions and terms prescribed in rule 152, the full amount being given only in the event of the Government servant being considered to be acquitted of blame, or, if the imprisonment was for debt, of its being proved that the Government servant's liability arose from circumstances beyond his contrl."

The words "committed to prison" mean sent to prison and not merely mean "committed to custody" (see Emp.V Tulshiram 30 All. 334 at page 339). If the strikers have been enlarged on bail pending their trial, they cannot be deemed to be "committed to prison on a criminal charge" within the meaning of rule 156 of the Bombay Civil Services Rules. There will therefore be no legal objection to allowing them to resume work.

Sd/-
28/8/46
Encumbrancer of Legal Affairs

U.M. to H.D. No 447-B-Confl, dated the 2nd September 1946

A.M.L.H. before issue)

Mr/20/4

It appears that Lt. Col. Bates was employed by Government on a contract basis for a period of three years commencing from 9th October 1944 the appointment being terminable at six months' notice on either side. He however enjoyed in advance 4 months leave on average pay out of India. Government has now decided to terminate his services after notice. The questions raised fro the consideration of the R.L.A. are:-

(1) Whether Government can claim refund of the pay for the unearned leave enjoyed in advance by Lt. Col. Bates.

(2) Whether Government is bound to provide a free passage to him.

Clause (7) of the agreement between Lt. Col. Bates (referred to as the "Covenantor") of the one part and the Government of Bombay of the other part provides:-

"The Covenantor shall be permitted to take in advance four months leave on average pay out of India against the leave to which he shall be entitled under rule 3 of appendix LI of the Bombay Civil Services Rules."

Rule 3 of the Rules in appendix LI lays down:

"When the contract is for three years and over leave on average pay up to 1/11th of the period spent on duty, up to a maximum, of three months at a time or four months at a time if leave is spent out of India, to which may be added on medical certificate leave on average pay up to a maximum of three months reckoned in terms of leave on average pay is admissible".

Lt. Col. Bates is a person serving in connection with the affairs of the Province of Bombay within the meaning of section 241(2)(b) of the Government of India Act, 1935, and therefore subject to the provisions of the Bombay Civil Services Rules. Although Lt. Col. Bates could take in advance four months leave on average pay out of India, he would be entitled only to 1/11th of the period spent on duty. Consequently the period of leave which he would be entitled to at the termination of his services should be computed to

ant and the balance treated as unearned leave within the meaning of the note (iii) below clause (c) of rule 736 of the Bombay Civil Services Rules. Under clause (b) of rule 757 subject to the provisions of rules 736, 758, 759, 760 and 761, a Government servant on leave shall during leave draw, if the leave is not due, leave salary equal to half average pay. He has drawn full average pay for the period of leave. Consequently he would be liable to refund the excess drawn by him. This amount can be deducted from his pay on the termination of his services.

Clause (8) of the agreement provides:-

> "On the <u>termination of the contract</u> a free passage by sea from India to England will be given to the Convenantor and his wife. if she is then in India- in accordance with the rules governing Lee Commission passages to class I officers of All India Services.

"Termination of the contract" may be either by efflux of time or by notice on either side as provided in the agreement. Consequently it appears that Lt. Col. Bates will be entitled to a free passage by sea from India to England even if Government terminates his services at six months' notice.

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28/8/46

Remembrancer of Legal Affairs.

Mr/20/4

Office of the R.L.A.

It appears that by G.R.(R.D.)No.0131/39,dated 10th August 1945 Government created a temporary post of 'Saw Doctor' for saw mills for a period of one year and appointed thereto Mr.R.A. Pereira on a contract basis subject to the condition that the contract can be terminated by one month's notice on either side; and by Order No.0131/39/1927/D dated 2nd August 1945 Government directed that the post should be continued for a further pe period of one year with effect from 19-8-1945 and Mr.R.A Pereira should continue to hold it subject to the condition mentioned in G.R.No.0131/39, dated 10th August 1943 The contract terminated on 18th August 1946 by efflux of time but Mr.R.A. Pereira is still continued in service. The questions raised for the consideration of the R.L.A. are:

(1) Whether on the termination of the contract period, Mr.Pereira can be deemed to be employed on monthly basis; and

(2) If so, whether his services can be dispensed with on giving one month's pay in lieu of notice.

The G.R. (R.D.)No.0131/39, dated 10th August 1943 makes no provision as to how the service of Mr.R.A.Pereira. if continued after the expiration of the contract period, should be treated Consequently it would be just and equitable to treat his service after 18th August 1946 as on monthly basis. He would therefore be entitled either to a month's notice or to a month's pay in lieu of notice The view taken by the Chief Secretary is correct

Sd/- 9/9/46
Remembrancer of Legal Affairs

U.R. to P.S.D. No 483-p dated the 10th September 1946.

Mr/20/4

Office of the R.L.A

Rule II of the Rules in Appendix C to the Bombay Civil Services Classification and Recruitment Rules provides that every selected candidate so appointed as an Assistant Conservator of Forests on probation will be required to pass departmental and language examinations in accordance with the rules prescribed by Government for these examinations. Rule 3 of the Rules for the examination of Gazetted Forest Officers lays down:-

> "Every officer appointed direct as Assistant Conservator of Forests on probation shall appear for examination in subjects (b)(c) and (d) mentioned in rule, at the latest at the first examination held by the Public Service Commission after the expiration of the first year of his probation. Should such officer fail to pass the examination he shall render himself liable to have his increments withheld until he passes the examination or Government may at its descretion dispense with his services or may deal with him in such manner as it may deem fit".

Mr. C.J. Fernandes is one of the four persons appointed as Assistant Conservator of Forests in Class II of the Bombay Forest Service on probation for a period of two years from the date he joined the appointment (see G.R.R. No.7785/28, dated 12-5-1944). He joined the Department on 4th April 1944. Since he did not pass the departmental and language examinations within the period of his probation i.e. before 12th May 1946 he rendered himself liable to have his increments withheld or to have his services dispensed with or to be dealt with in such manner as Government would deem fit. The question of extending the period of his probation cannot therefore arise at this stage ~~meaning~~ Government may withhold his increment until he passes both the departmental & language examinations or dispense with his services or give him time to pass the aforesaid his examinations failing which he might be discharged from service.

The R1.A&n opinion No' 4545, dated the 20th July 1936 is distinguishable and has no application to the present case.

Sd/-
21/9/46

Remembrancer of Legal Affairs.

U.R. to P.&S.D. No. 249-Confl. dated the 23rd September 1946

Mr/20/4

Office or

In his letter No 4003, dated the 22nd November 1945 to the Executive Engineer the Government Pleader, High Court opined:

> "On looking into the authorities I am of the opinion that Mr. Gunasta (engaged on work-charged establishment) is not entitled to any salary for the broken portion of the month. He was engaged by the month. He was bound in law to give due notice before leaving. He committed a breach of the contract in as much as he left without giving due notice. In addition, Government is entitled to claim damages for the breach of contract of service. Mr. Gunasta is not entitled to the salary of the broken portion of the month It is however not possible to forfeit the salary of the full month. if already accrued to him".

In his Opinion No. 1427, dated the 20th February 1946, the R.L.A. agreed with the opinion of the Government Pleader, High Court. While according the opinion of the Government Pleader, High Court the Public Works Department observes.

> "The subordinate committed a breach of the contract ~~standingpertaining~~ he left without giving due notice. It is not stated by the Government Pleader to what extent Government is entitled to claim damages. It is not possible to forfeit the salary of the full month if already due to the subordinate. This presumably means that the salar for the period 11th to 31st December has to be paid to the subordinate which has been already due. From the above analysis of the legal opinion it will be seen that it does not cover all the points and is not therefore complete and self contained for communication to the local officers of this department"

The R.L.A. is requested furnish a complete and self contained opinion for the guidance of local officers of the Public Works Department in regard to appointments of men borne on the regular temporary and work charges establishments in the Public Works Department as defined in the Public Works Department Manual Vol I paras. 32-33.

The attention of the Public Works Department is invited to para. 104 of the Secretariat Instructions and that Department is informed that the R.L.A. can express his opinion on the point or points already stated in the reference and not on any general question. It appears from

paras 88-92 of the Public Works Department Manual Vol I that roughly speaking there is no material distinction between overnment servants in Temporary Establishments and those in the Work-charged Establishments so far as the conditions of their employment are concerned. It is stated in para 88(ii) as follows:-

> "If the members of the temporary establishment are engaged for a specific work, their engagement lasts only for the period during which the work lasts, If dismissed otherwise than for serious misconduct before the completion of the work for which they were engaged, they will beentitled to a month's notice or a month's pay in lieu of notice; but otherwise with or without notice, their engagement terminates when the work ends. If they desire to resign their appointments, the will be required to give a month's notice of their intantion to do so or forfeit a month's pay in lieu of such notice. These conditions, as well asthose regarding leave allowance and pension mentioned in (iv) below should be clearly explained to the men employed and a writtendeclaration obtained from then that the terms have been clearly understood by them"

In view of this, Public Works Department may not find any difficulty in determining the rights and liabilities of Government in respect of Government servants engaged for a specific work whether they be in the Temporary Establishment or Work-Charged Establishment. In addition to the forefeiture of a month's pay Government would beentitled to forfeit the salary for the broken period of the month if a Government servant engaged for a specific work leaves Government service before the end of the month without giving a month's notice. With regard to Government servants in the Temporary and work-charged Establishments other than those engaged for a specific work the ordinary rule of one month's notice on either side will apply, provided of course no such notice on thepart of ~~the~~ month Government would be necessary when the servant is guilty o: misconduct. If the servant leaves Government's service without a month's notice before his pay for the month has accrued, Government would be entitled to forfeit his salary for the broken period of the month and also to damages. These damages would be such as are

...nable and the probable consequence of the servant's brea
of contract, including any expenses which Government may be
compelled to incur (se Halsbury Vol.XXII p.161) In other words
it means that if Goveerrment has been able to replace the
Government servant but on a high salary. the excess salary for
few one month would be the damage Government can claim from hi
but if Government is unable to find a substitute and thereby
the work suffers, Government can claim from the servant
the damage to the extent of the loss suffered by Governm-
ment and that will be a question to be decided on the
Particular facts of each case.'

Sd/-
21/8/46

Remembrancer of Legal Affairs.'

U.O.R.' to P.W.". No'5861 dated the 24th August 1946

Mr/20/4

Submitted.

2. Please see notes at pp. 37-41 ante. Mr. A.P. Kavalder, a temporary Asstt. Inspector of Motor Vehicles, was suspended from 17-3-1944 along with two other Asstt. Inspectors on the D.C.P. Thana reported detection of a number of overloaded lorries having been allowed by them when they were on duty at Kalwa and Rustomji Koigbridgen at Thana on 15th March 1945. As there was no sufficient evidence to secure a conviction in a Court of Law, departmental action was contemplated against him. Before however departmental enquiry could be completed his services were dispensed with as a result of retrenchment from 1-11-1945 and the enquiries were subsequently dropped as Kavalder was no longer in Government service. H.D. is of the view that in the absence of a complete departmental enquiry it is difficult to determine whether his suspension was or was not justifiable within the meaning of the Bombay Civil Service Rules 152 and giving him the benefit of the peculiar circumstances he may be allowed the arrears of pay and allowances from the date of his suspension to the date of his retrenchment. The Fin Advr. agrees with H.D. and states that as there was no finding B.C.S.R. 152 will not be applicable. He further observes:-

"The rules do not contemplate a case of the kind and there is, therefore, no specific provision. It may be urged that, as Mr. K. was under suspension until his retrenchment, he is entitled to no more than what B.C.S.R. 151 provides

for it. That may be according to the letter of the rule, but, if the rule is worked in this manner it may prove unfair to a really innocent party. If in view of what is stated at on page 35, Government wishes to explore this line of approach, the R.L.A. may be consulted.

The R.L.A. is requested to advise in the matter

3. Rule 151 of the Bombay Civil Serfices Rules provides that a Government servant under suspension is entitled to a subsistence grant at such rates as the suspending authority may direct, but no exceeding one-fourth of the pay of the suspended Government servants Rule 152 provides that when the suspension of a Govt servant is held to have been unjustifiable or not wholly justifiable; or when a Government servant who hasbeen dismissed, removed or suspended it reinstated; the revising or appellate authority may grant to his for the period of his absence from duty

(a) If he is honourably acquitted, the full pay to which he would have been entitled if he had notbeen dismissed, removed or suspended and, by an order to be apparately recorded any allowance of which he was in receipt prior to his dismissal, removal or suspension or

(b) If otherwise, such proportion of such pay and allowance as the revising or appellate authority may prescribe.

In a case falling under clause (a), the period of absence from duty will be treated as a period spent on duty. In a case falling under clause (b), it will not be treated as a period spend on duty unless the revising or appellate authority so direct. Note I provides that in deciding whether any pay and allowances should be granted under this rule to Government servants in temporary employ the period for which the temporary appointment has been sanctioned should be taken into consideration or

In the present case Mr. Havaldar was suspended from 17-3-194 but he was not prosecuted as there was no sufficient evidence to secure a conviction in a court of law. Although departmental enquiry was contemplated no enquiry was held or completed as required by Rules 55 of the Civil Services (Class.Control and Appeal) Rules. In the absence of any departmental enquiry it would be difficult to hold that Mr. Havaldar's suspension was justifiable. Under the rules a s they stand when a

Office of the R.L.A.

Rule 152 of the Bombay Civil Services Rules inter alia provides that when the suspension of a Government Servant held to have been unjustifiable or not wholly justifiable, the revising or appellate authority may grant to him for the period of his absence from duty.

(a) If he is honourably acquitted etc; or

(b) if otherwise, such proportion of such pay and allowance as the revising or appellate authority may prescribe.

It appears from this provision that the power to hold whether the suspension of a Government servant has been unjustifiable or not wholly justifiable vests in the appellate or revising authority and this power can be exercised on the materials available in each case. Although the departmental enquiry was not proceeded with in the present case for certain valid reasons merely the retrenchment of the post held by Mr. Havaldar under suspension, that would not preclude Government from holding on materials available whether Mr. Havaldar's suspension was unjustifiable or not wholly justifiable and decide whether he should be paid any proportion of his pay and allowance under rule 152(b)

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for Remembrancer of Legal Affairs.

U.B.R. to H.D. No. 7039 , dated the 18th October 1946.

Hr/21/4

Office of the R.L.A

It appears that Government has proposed to dispense with the services of all Government servants who have been re-employed on a temporary basis after superannuation. The question raised by the Chief Secretary for the consideration of the R.L.A. is whether in cases where there is no provision for terminating employment by notice in a temporary appointment notice of one month would be legally unobjectionable or not.

It is true that clause (a) of rule 330 of the Bombay Civil Services Rules contemplates that the re-employment of Government servants after superannuation is to be made in a purely temporary capacity; but such re-employment does not mean during the pleasure of Government. All that it means is that the Government servants thus re-employed cannot claim the privileges which permanent Government servants are normally entitled to. Consequently the general principles of law which regulate the relations between master and servant apply to Government servants re-employed after superannuation. There would, therefore, be no legal objection to terminating the services of such re-employed Government servants by notice of one month provided there is nothing in the order of their appointment either fixing the period of appointment or definitely suggestive of such fixation. The order of appointment of each such Government servant should be examined before terminating his services by notice of one month.

It appears from the statement at page 78 ante that Mr. P.G. Shah has been re-employed after superannuation and it is stated therein that the tenure of appointment expires on 28th February 1947. In the absence of the order of Mr. Shah's appointment it is not possible to say whether the post held by him is sanctioned up to 28-2-1947 or the period of his appointment

expires on 28-2-1947. In the former case there is no objection to terminating his services by notice of one month, while in the latter case his appointment will have to be allowed to expire by efflux of time

Sd/-
29/10/46

Remembrancer of Legal Affairs

U.R. to P. & S.D., No 266-Confl dated October 1946

Mr/21/4